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No. 98-38

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

PAUL W. BERGER and ERMA R. BERGER,
*Cross-Petitioners,*

v.

CABLE NEWS NETWORK, INC., TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER, JACK HAMANN, RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,
*Cross-Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## OPPOSITION OF FEDERAL OFFICERS TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Do the media violate the Electronic Communications Privacy Act of 1986 (the Wiretap Act) by surreptitiously recording conversations through a hidden microphone worn by a law enforcement agent who enters a private residence beyond the scope of the search warrant's authority?

2. Are the media entitled to perpetually republish or sell video and audio recordings, or is an injunction appropriate, where there is a final judicial determination that the media unlawfully obtained the video and audio recordings in violation of the Constitution or laws of the United States or any state?

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## OPPOSITION OF FEDERAL OFFICERS TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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## INTRODUCTION

This case -- which remains in its preliminary stages and has not yet gone to trial -- has spawned two separate petitions for *certiorari* and now a conditional cross-petition for *certiorari*. In fact, the federal officers have raised the only clean legal issue that is appropriate for resolution at this early stage of the litigation: the validity of the qualified immunity defense they have raised as a bar to the *Bivens* claims asserted against them.

All other issues, including those raised in the conditional cross-petition, are premature, insubstantial, or otherwise not worthy of plenary review by the Court at this time.

## COUNTERSTATEMENT OF THE CASE

This lawsuit stems from an investigation by the United States Fish and Wildlife Service in the Department of the Interior. It resulted in the conviction of Mr. Berger for using a registered pesticide (Furadan) in a manner inconsistent with its labeling, under 7 U.S.C. § 136j(a)(2)(G). Pet. App. 7a.[1]

The federal officers in this case are four special agents of the United States Fish and Wildlife Service in the Department of the Interior and an Assistant United States Attorney who helped plan and participated in the investigation. To obtain evidence concerning allegations that Mr. Berger had killed numerous eagles on his ranch, they sought a warrant to search the ranch. The reasonableness and validity of that warrant is not in question here. The officers also agreed to allow employees of Turner Broadcasting System (TBS) and Cable News Network (CNN) to accompany them and report on the conduct of their investigation. The Government's objective was "to publicize its efforts to combat environmental crime." Pet. App. 4a. The video footage was placed under embargo until any resulting criminal proceedings had effectively concluded. *Id.* at 4a-5a.

On the morning of March 24, 1993, the team of federal officers, accompanied by a CNN media crew, proceeded to the Bergers' ranch and properly executed the search warrant. Their actions were audiotaped and videotaped by the media crew at all times. The media crew, however, did not actively participate with the officers in a search for evidence. Pet. App. 36a. In the subsequent prosecution of Mr. Berger, he filed a motion to suppress this evidence at his trial, contending that the warrant was defective and the officers lacked probable cause to

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[1] The citations referenced as "Pet. App." are from the decisions below in this case as set forth in the appendix that was filed with the petition for *certiorari* in *Hanlon v. Berger*, Case No. 97-1927, which is currently pending before the Court.

undertake the search. The motion to suppress evidence was denied. *Id.* at 7a.

The Bergers sued the federal officers and the media under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), alleging the violation of their constitutional rights. They also brought other federal and state law claims against the media, including a claim for injunctive relief. The principal contentions under *Bivens* were that the federal officers violated the Fourth Amendment by permitting the media crew to film their execution of the search warrant, and that the media acted sufficiently in concert with the officers to be treated as government actors in this lawsuit. Pet. App. 2a. The federal officers moved to dismiss the *Bivens* claim, or in the alternative for summary judgment, based on their defense of qualified immunity.

The District Court treated the motion as one for summary judgment, denied the request for injunction, and dismissed the claim raised under the Federal Wiretap Act. It also upheld the federal officers' defense of qualified immunity, holding that the constitutional rights alleged by the Bergers were not "clearly established" in March of 1993. Pet. App. 34a. Indeed, the court noted that such law as existed at that time had tended to uphold the constitutionality of the officers' conduct. The court also held that the media had not become government actors for purposes of *Bivens* liability. *Id.* at 39a-40a.

On the latter points, the Ninth Circuit reversed. On the issue of qualified immunity, in particular, the court cited with approval the Second Circuit's decision in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), which "held that even though there was then no reported decision expressly forbidding agents from inviting the press into the home of the person searched, no reasonable officer could have thought it permissible." Pet. App. 11a. It briefly, and unconvincingly, sought to distinguish the contrary holdings on qualified immunity reached by the Eighth and Fourth Circuits. *Id.* at 12a. The court affirmed the trial court's rulings on the request for an injunction and on the wiretap claim, and the case was thereupon remanded for trial.

## REASONS FOR DENYING THE WRIT

The conditional cross-petition raises issues that are premature, insubstantial, or otherwise not certworthy at this time. For these reasons, the Court should limit its grant of *certiorari* in these related cases to the cleanly presented questions presented in *Hanlon v. Berger*, Case No. 97-1927, which concern whether the federal defendants are entitled to prevail on their defense of qualified immunity and be dismissed from this litigation. Those issues are timely and important, and would allow the Court to resolve a direct conflict among the circuit courts of appeals, in contrast to the more pedestrian issues raised conditionally in this petition.

The cross-petition claims that the courts below erred in two respects: both allegedly erred in denying plaintiffs' request for an injunction, noting that the request sought a prior restraint, which is routinely held to be impermissible under the First Amendment, *see* Pet. App. 25a-26a; *see id.* at 42a; and both allegedly erred in dismissing plaintiffs' claims brought under the Federal Wiretap Act, 18 U.S.C. §§ 2510 *et seq.*, for various reasons, including that a party to the conversations consented to their interception, *see* Pet. App. 22a; *see id.* at 42a. On each point, the rulings below were correct and do not warrant review.

To begin with, even on the cross-petitioners' own terms, the issue that they raise concerning their motion for injunction is premature at this time. They acknowledge, for example, that any injunction that they could obtain should only issue "[f]ollowing a final judgment that the Media's method of obtaining the video and audio recordings of the Berger search violates the Constitution." Cr.-Pet. 24. This case, however, is as yet only in its preliminary stages, in which pretrial motions are being resolved. The cross-petitioners later reframe the issue in the same revealing vein: "Here, the Bergers would seek a final determination of the unlawfulness of the Media's newsgathering practices. An injunction *after* this determination is appropriate." *Id.* at 25 (emphasis added).

Obviously, at this point in the litigation, plaintiffs have sought an injunction *before* undertaking to prove their claims at

trial. If the facts they allege are eventually established, they could renew their motion for injunction at that time. At that juncture, they would still face an insuperable hurdle in showing that the outcome they seek is not an impermissible prior restraint, but in any event they cannot demonstrate their entitlement to such extraordinary relief at this point.

Moreover, plaintiffs demand relief here that would impose a classic prior restraint on publication. Under this Court's cases, it is manifest that such relief is rare at best and perhaps may never be permitted under the First Amendment. Indeed, the cross-petitioners do not even see fit to cite or discuss the ruling in *CBS, Inc. v. Davis*, 510 U.S. 1315 (1994) (Blackmun, Circuit Justice, staying preliminary injunction), which was heavily relied on by both courts below and is directly instructive here. In that situation, CBS was investigating unsanitary practices in the meat packing industry, and obtained a videotape furnished by a company employee detailing actions that took place in the company's meat packing facility. The company sought to bar CBS from broadcasting the videotape, contending that the information on the tape was obtained unlawfully under state law. *See id.* at 1316-17. The Court, through Justice Blackmun, concluded that the injunction, if issued, would constitute a prior restraint, and "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Id.* at 1317. This "most extraordinary remedy" is acceptable only in exceptional cases where any harm in the dissemination of the speech is both great and certain and cannot be mitigated by less intrusive measures, which was a far cry from the circumstances at stake in the case against CBS. *Id.*

The cross-petitioners do not even allege that there is any conflict among the circuits on this issue.[2] Instead, they contend

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[2] The cross-petitioners do mention *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), a case enjoining the paparazzi from harassing Jacqueline Onassis and her children. Even in *Galella*, however, the court did not impose any prior restraint on publication or even photographing of the family, but simply imposed more traditional time, place, and manner restrictions. *Id.* at 991-992.

that the ruling below is inconsistent with a few of this Court's decisions -- decisions that have little or nothing to do with the actual situation presented in this case. In *New York Times Co. v. United States*, 403 U.S. 713 (1971), for example, the Court *refused* to enjoin publication of the Pentagon Papers, despite the Government's claim that its publication would create imminent danger to the national security. *Id.* at 714. The case of *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), is plainly inapposite, as it involved mere commercial speech, which is not afforded the same liberty from government regulation. The case of *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), which the cross-petitioners portray as leaving an important open question about the imposition of prior restraints, actually involved only damage claims. The case of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1982), involved an injunction against the use of chokeholds by police officers.

Any suggestion that these cases have any meaningful bearing on the First Amendment issue presented in the cross-petition here is facetious. The core doctrine of deep hostility to prior restraints is one of the more settled areas of free speech law, and it does not warrant further review in this case.

The other issue raised in the conditional cross-petition -- plaintiffs' claim that the Federal Wiretap Act was violated in the circumstances of this case -- fares no better. The District Court ruled that this claim was defeated by the exception contained in the statute for the interception of conversations where one party to the conversation has given consent and the purpose for the interception is not to commit a crime or tortious act. *See* Pet. App. 41a-42a (citing 18 U.S.C. § 2511(2)(d)). Without addressing this point, the Ninth Circuit held that this claim was defeated by yet another exception contained in the statute for the interception of conversations by persons acting under color of law where one party to the conversation has given consent. *See* Pet. App. 21a-22a (citing 18 U.S.C. § 2511(2)(c)).

Both of these alternative grounds are sound, and each provides sufficient support for the lower courts' disposition of this claim. The District Court, granting summary judgment on

this claim, held that the interception in this case was not made for the purpose of committing a crime or tortious act, but instead "for the purpose of producing a news story and for the defendants' commercial gain." Pet. App. 41a. Even if, in the end, the trial court were ultimately to rule that a tort had been committed in the circumstances of this case, and damages were to be assessed under state law, that was clearly not the "purpose" of the interception, which is the legal insulation that the statute enacted by Congress provides against subjecting individuals to absolute liability under federal law any time that they are adjudged to be tortfeasors under state law. None of the discussion of this point presented by the cross-petitioners would justify reading the Federal Wiretap Act so broadly as to make liability under its more limited provisions coterminous with all of state tort law.

Moreover, the reading that the Ninth Circuit gave to the "under color of law" language of the other exception to the federal statute is unexceptional and unworthy of review by this Court. The court below held that this language has as its core aim to shield from liability "those acting under law enforcement authority," and since the actions taken in this case were undertaken under the authority of a search warrant, the statutory exception would apply to prevent liability under federal law. Pet. App. 22a. This approach again is sensible in reading the federal statute as not designed to incorporate all potential liability under state law. Whether or not the media defendants in this case violated state tort law, and should be held liable in damages on that basis, is simply a different question from whether they should be held liable under the more limited provisions of the Federal Wiretap Act. The central flaw in the cross-petitioners' argument is their failure to acknowledge this obvious fact.

The cross-petitioners do profess to find a conflict in the circuits on the "under color of law" issue -- which, again, is at most an alternative ground for the disposition reached by the trial court and affirmed by the court below -- but that alleged conflict does not withstand analysis. In *Thomas v. Pearl*, 998 F.2d 447 (7th Cir. 1993), a basketball player sued a basketball

coach for having surreptitiously recorded their telephone conversations as he sought to recruit the player. The Seventh Circuit held that these actions were not covered by the "under color of law" exemption in the Federal Wiretap Act because they did not involve "law enforcement officers acting within the scope of their authority." *Id.* at 451. Indeed, the Seventh Circuit did not even draw the scope of this exemption quite so narrowly, going on to explain that there must simply be "some logical and reasonable connection between the government worker's job description and eavesdropping." *Id.* This analysis of the federal statute is completely consistent with the approach taken by the court below in this case, which held that the "under color of law" exemption operates "to exempt those acting under law enforcement authority," and since "both the federal appellees and the media appellees were acting under authority of a search warrant, the exception applies." Pet. App. 22a (agreeing with and distinguishing *Thomas*).[3]

Other than their baseless assertion of a conflict between *Thomas* and the decision below, the cross-petitioners do not present any persuasive grounds for the Court to grant plenary review on the federal wiretap issue.

In contrast with the foregoing discussion, the qualified immunity issues presented in *Hanlon v. Berger*, Case No. 97-1927, do merit review at this juncture. The question of whether law enforcement officers violate clearly established law under the Fourth Amendment when they allow members of the news media to accompany them and report on their conduct in properly executing a valid warrant, thus forfeiting their qualified immunity from suit, is fully ripe. This question has spawned a direct conflict between the Second and Ninth Circuits, on the

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[3] In addition, the ultimate holding in *Thomas* was that the coach *was* exempt from liability under the federal statute, because he did not intend to commit a tort against the player -- a conclusion that echoes and accords with the conclusion reached by the District Court in this case, and which is necessary in order to prevent the federal statutory liability from swallowing and overlapping all of state tort law. *See* Pet. App. 41a-42a.

one hand, and the Fourth and Eighth Circuits, on the other. *Compare Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994) (denying qualified immunity), *cert. denied*, 514 U.S. 1062 (1995), *and Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997) (denying qualified immunity), *cert. pending in* Case No. 97-1927, *with Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996) (granting qualified immunity), *cert. denied*, 117 S. Ct. 1081 (1997), *and Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998) (en banc) (granting qualified immunity), *cert. pending in* Case No. 98-83. The issues raised are important both in terms of the public's access to the information necessary to understand and supervise law enforcement officers and in terms of the officers' ability to perform their duties with "the decisiveness and the judgment required by the public good," *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974), without being too freely subjected to "potentially disabling threats of liability," *Elder v. Holloway*, 510 U.S. 510, 514 (1994). *Those* issues, not the tangential and uncertworthy issues raised in this conditional cross-petition, are worthy of the Court's full consideration and resolution at this time.

## CONCLUSION

The conditional cross-petition should be denied, and the qualified immunity issues presented in *Hanlon v. Berger*, Case No. 97-1927, should be granted.

Respectfully submitted,

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